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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/730,260	12/09/2003	Toshifumi Otsubo	2038-310	3334

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LOWE HAUPTMAN GILMAN & BERNER, LLP  
Suite 300  
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Alexandria, VA 22314

EXAMINER
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HAND, MELANIE JO

ART UNIT	PAPER NUMBER
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3761

MAIL DATE	DELIVERY MODE
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01/06/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/730,260

**Applicant(s)**

OTSUBO, TOSHIFUMI

**Examiner**

MELANIE J. HAND

**Art Unit**

3761

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 21 October 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 3,5-16, 18-21 and 23-29 is/are pending in the application.
- 4a) Of the above claim(s) 3,6-14, 16, 18-21 and 24-29 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 5,15,23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB08)
- Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 21, 2008 has been entered.

### ***Election/Restrictions***

2. Newly amended claims 3, 6-14, 16, 18-21 and newly submitted claims 24-29 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: Independent claim 3 as amended now recites joining sites that comprise joining sites arranged in the middle zone of the absorbent structure. The embodiment of the claimed invention that has received an action on the merits is the embodiment recited in claim 15, which recites joining sites arranged only along, and in vicinities of, the transversely opposite side edges of the absorbent structure, which excludes a variant in which there are joining sites in a middle zone of the absorbent structure. Claim 3 is thus now directed to an embodiment that has mutually exclusive characteristics with respect to the embodiment already examined on the merits. Claims 6-14, 16, 18-21 and 24-29 depend directly or ultimately from claim 3.

3. Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 3, 6-14, 16, 18-21 and 24-29 are withdrawn from

consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03. This leaves claims 5, 15 and 23, which are examined herein.

***Response to Arguments***

4. The rejection of claims 5, 15 and 23 under 35 U.S.C. 112 is withdrawn. Upon further examination of these claims it is found that the basis of rejection, i.e. lack of support in the disclosure for the limitation of uniform distribution of a plurality of joining sites, does not pertain to these claims.
5. With respect to arguments regarding the rejection of claim 5 under 35 U.S.C. 103: Applicant is unclear as to the problem sought to be solved by one of ordinary skill in the art that would lead to a diaper having auxiliary elastic members as measured in the contracted or unstretched state that are substantially equal to a corresponding length of the structure in one of the front and rear waist regions, both lengths being measured in the waist surrounding direction. the rejection states that if there is a design need or market pressure to solve a problem. To clarify examiner's position the design need is the need to position the components of concern, the absorbent structure and elastic members, such that they provide their intended functions or improved properties while still meeting the constraints on size and relative position imposed by the torso and crotch area of the wearer. As stated in the rejection, the crotch area total width, and thus the width of the absorbent structure is limited by the near-universal width between the legs of a user among humans of the same gender. Jitoue explicitly discloses a "width of face" of the elastic band of the 2nd drum, or rear waist region is 3-20 mm. Since the elastic member is a band, it is interpreted that this 3-20 mm refers to the larger dimension, i.e. the length of the band in the waist surrounding direction. ('225, 0012) With these two constraints, the near-universal crotch width among humans of each gender and the range of lengths explicitly disclosed by

Jitoue, there are a finite number of identifiable predictable solutions that would then yield an elastic member length that is within 1-5 mm of the absorbent structure length. In order to preserve the structure and benefit imparted by the Jitoue diaper, the structure length and elastic length must be adjusted together; it is examiner's position that one of ordinary skill in the art would have no reason, and would not attempt, to adjust them separately when a readily apparent relative dimension that provides a certain fit benefit to the wearer is already present.

6. As to arguments regarding claim 15, claim 15 also recites joining sites joining the opposite end portions of the auxiliary elastic members to the side edges of the chassis as well as to the side edges of the absorbent structure. Therefore, though this limitation of joining sites all arranged only along and in vicinities of the transverse opposite side edges of the absorbent structure is supported by the disclosure, it is given its broadest reasonable interpretation consistent with said disclosure, i.e. the all of the joining sites present in the discrete region of the side edge of the absorbent structure are all arranged only along or in vicinities of the transversely opposite side edges, where vicinities can include the side edges of the chassis.
7. Applicant's argument regarding claim 23 appears to rely on substantially identical claim 13, for which arguments are presented that in turn rely on arguments presented with regard to claim 5, addressed *supra*.

***Claim Rejections - 35 USC § 103***

8. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
9. Claims 5, 15 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jitoue et al ('225).

With respect to claim 5: Jitoue teaches a pants-type disposable wearing article 1 having a longitudinal direction, a waist-surrounding direction orthogonal to said longitudinal direction, a front waist region 6, a rear waist region 7, a crotch region, an elasticized waist-hole 11 and a pair of elasticized leg-holes 12. The article 1 comprises a chassis and an absorbent structure 4 extending on an inner surface of said chassis between said front and rear waist regions 6,7, and a plurality of auxiliary elastic members 21 secured to said chassis in a stretched state in said waist surrounding direction so as to cross said absorbent structure 4 in at least one of said front and rear waist regions 6,7, said article 1 further comprising: said plurality of auxiliary elastic members 21 having opposite end portions defined as those portions of the elastic 21 extending between a side edge 23 of core 4 and the respective side edge of diaper 1, and a middle portion in said waist surrounding direction, said opposite end portions being secured to said chassis in vicinities of opposite side edges of the one of said front and rear waist regions (i.e. joining regions 9) while said middle portion being free to said chassis in the one of said front and rear waist regions.

Jitoue does not teach explicitly that a length of said auxiliary elastic members 21 in the waist-surrounding direction as measured in a contracted state thereof is substantially equal to a corresponding length of the absorbent structure in the one of said front and rear waist regions. The term "substantially equal" is interpreted herein in accordance with the following quantitative definition disclosed by applicant: "said length of said elastic members 21 is greater than a corresponding length of the absorbent structure in the one of said front and rear waist regions by 1-5 mm." However, this range is considered herein to fairly suggest a core having a width in which a auxiliary elastic member length in the range taught by Jitoue presents a length which exceeds a corresponding length of the absorbent structure (i.e. what is commonly called the transverse width) by 1-5 mm, as there is a finite number of absorbent core widths that will meet

the claim limitation. The range of combinations of corresponding absorbent structure lengths and elastic lengths that meet this claim limitation is further limited by the distance between the legs of a user, which is universal among users of roughly the same size. That is, there is one substantially universal, standard limit on core width for infants and toddlers, and a second and larger, substantially universal limit on core width for adults. If there is a design need or a market pressure to solve a problem, and there are a finite number of identified, predictable solutions, a person of ordinary skill in art has good reason to pursue known options within his or her technical grasp, and if this leads to anticipated success, it is likely product of ordinary skill and common sense, not innovation. See *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385 (U.S. 2007) One of ordinary skill in the art would be motivated to try core widths that conform to anatomical dimensions, i.e. one of ordinary skill in the art would have good reason to pursue known options within one's technical grasp for the core width in the article of Jitoue that, in combination with an auxiliary elastic member length in the range taught by Jitoue would meet the claim limitation. It would therefore be obvious to one of ordinary skill in the art to modify the article of Jitoue such that an auxiliary elastic member length in the unstretched state is within the range taught by Jitoue that renders the elastic length substantially equal to the corresponding absorbent structure length by 1-5 mm.

With respect to **claim 15**: Jitoue teaches a pants-type disposable wearing article, comprising: a longitudinal direction, a waist-surrounding direction orthogonal to said longitudinal direction, a chassis defining a front waist region 6, a rear waist region 7, a crotch region extending in said longitudinal direction between said front and rear waist regions (Fig. 1), an elasticized waist-hole 11 (Fig. 1, Abstract) and a pair of elasticized leg-holes 12 having elastic members 16 (Fig. 1, ¶0018), an absorbent structure 4 extending on an inner surface of said chassis between said

front and rear waist regions 6,7 (Fig. 1, ¶¶0014). A plurality of auxiliary elastic members 21 are secured to said chassis by being elongated uniformly crosswise of diaper 1 (see Fig. 1) and then joined to the side edges of the diaper 1 in joining regions 9 (i.e. they are secured in a stretched state) (¶¶0018). A plurality of elastic members 21 extend in said waist surrounding direction so as to cross said absorbent structure 4 in at least one of the front and rear waist regions. (¶¶0016) Each of said auxiliary elastic members 21 have, in said waist surrounding direction, opposite end portions defined by those portions that extend from respective side edges 23 of core 4 to the respective joining region 9 of diaper 1, and a middle portion located between said opposite end portions, said opposite end portions being secured to said chassis in vicinities of transversely opposite side edges of the one of said front and rear waist regions (i.e. the vicinities are side edges of diaper 1 comprising joining regions 9 taught by Jitoue). (¶¶0016-0018) The chassis comprises an outer sheet 3 in the form of a rear face sheet and an inner sheet 2 in the form of a liquid permeability surface sheet joined at a plurality of joining regions, e.g. regions where elastics 21 are joined to the surface sheet 2 and/or rear sheet 3. (Figs. 1-3) Jitoue teaches that the core 4 is bonded to the rear face sheet 3, therefore there exist joining sites distributed at least in an area underlying said absorbent structure 4 in the one of said front and rear waist regions 6,7 (¶¶0016) and that are spaced one from another by a given space in said longitudinal direction (Fig. 1). The said joining sites are necessarily located between the middle portions of said auxiliary elastic members 21 as the middle portions of the members 21 are defined as the portions that extend between edges 23 of core 4. This arrangement of joining sites between the middle portions of the elastics is the only arrangement that would be consistent with Jitoue's teachings regarding attachment of the core to the outer sheet 3 and the lack of attachment of elastics 21 to the outer sheet 3 except for the side regions. (¶¶0017,0027) The joining sites of Jitoue are present in the side regions (¶¶0017), and also uniformly between



the core 4 and rear face sheet 3 but between the middle portions of said elastics 21 (see ¶0027 and examiner's further explanation below). Because the joining sites are in the side regions and the front and back waist regions 6,7 are "join[ed] mutually" and the joins are "intermittently located" in the joining region, Jitoue teaches joining sites that are spaced from one another by a given space in the longitudinal direction both in the side regions and in the region where the core is attached to the outer sheet 3. (¶¶0014,0017,0027) As to joining sites located between the middle portions of the auxiliary elastic members 21, as stated in the previous Office action with respect to claim 3, examiner considers the middle portions of the elastics 21 to be the portion extending between the side edges 23 of the core 4. Jitoue teaches in paragraph 0027 that the core 4 can be joined to the rear face sheet 3. Since Jitoue also teaches in paragraph 0017 that the elastics 21 are free of attachment under core 4 because they are only attached to the outer sheet 3 at the side regions 9 and are free of attachment at the core edges 23, the only places where joining sites can exist between the core 4 and outer sheet 3 that would render them consistent with Jitoue's teaching in paragraphs 0017 and 0027 would be between the middle portions of the elastics 21, thus anticipating the limitation of joining sites located between the middle portions of auxiliary elastic members. Because said middle portions of said auxiliary elastic members 21 are free of direct securement to said chassis in the one of said front and rear waist regions 6,7, each of the auxiliary elastic members is necessarily entirely free of direct attachment to the chassis except at the opposite end portions of the auxiliary elastic member 21 (¶¶0017,0021) The joining sites 9 are arranged only along and in vicinities of the transversely opposite side edges of said absorbent structure. (Fig. 1)

With respect to **claim 23**: Each of said auxiliary elastic members 21 disclosed by Jitoue is positioned between said inner and outer sheets 2,3 (Figs. 2,3); the middle portion of each of

said auxiliary elastic members as defined *supra* by the Office with respect to claim 15 connects the opposite end portions of said auxiliary elastic member 21, and extends across an entire width of said absorbent structure 1 in the waist-surrounding direction from one of transversely opposite side edges of said absorbent structure to the other (Fig. 1, ¶¶0016,0017); and an entire section of said middle portion which is located between the transversely opposite side edges 23 of said absorbent structure 4 is directly bonded neither to the inner sheet nor to the outer sheet. (¶0017)

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MELANIE J. HAND whose telephone number is (571)272-6464. The examiner can normally be reached on Mon-Thurs 8:00-5:30, alternate Fridays 8:00-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on 571-272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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/Melanie J Hand/  
Examiner, Art Unit 3761